SUPREME COURT
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No. 867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NEW YORK TRAP ROCK CORPORATION, *Appellant*,

against

THE TOWN OF CLARKSTOWN, in the County of Rockland in the State of New York; the TOWN BOARD OF THE TOWN OF CLARKSTOWN, and ROSWELL P. BLAUVELT, JOHN DICKENMAN, ARTHUR GOEBEL, JOHN GILCHRIST and FRED M. SCHMERSAHL, as Members of said Town Board, and JOHN ELLIOTT, as Building Inspector of the Town of Clarkstown, *Appellees*.

Appeal from a Decision of the Court of Appeals of the State of New York

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JURISDICTIONAL STATEMENT

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INDEX

	Page
Proceedings and Opinions Below	1
Jurisdictional Statement	2
Questions Presented	3
Statutes Involved	5
Statement of the Case	5
The Federal Questions Are Substantial	9
I. This case presents the question of whether there are any Federal constitutional limitations on a state's exercise of the police power through a zoning ordinance held valid under state law which denies the use of a natural resource to its owner	9
II. The Federal questions here involved are expressly reserved and not decided by this Court in Hadacheck v. Sebastian, 239 U.S. 394 (1915).	12
III. The lower Federal courts and the high courts of the states are in conflict on the principal constitutional questions here involved.	13
IV. The Federal questions here involved are particularly substantial because despite the confusion in the lower courts no decision of this Court has heretofore dealt with the limitations, if any, imposed by the Federal Constitution on the exercise of state police power through zoning laws in their application to the natural resources or extractive industries.	14
V. Important questions under the Federal Constitution of deprivation, if not confiscation, of private property are involved.	16
VI. The concern of the Federal Government with the effective utilization and conservation of the Nation's natural resources, including rock and the crushed rock aggregate produced from it, cannot be doubted.	19
Conclusion	22

Page

APPENDIX A:

Judgment and opinion of the Supreme Court of the State of New York, Rockland County 1a-10a

Judgment and memorandum opinion of the Appellate Division of the Supreme Court of the State of New York 10a-14a

Order, Judgment and remittitur of the Court of Appeals of the State of New York 15a-17a

Order of the Court of Appeals denying Appellant's motion for reargument and amending the remittitur 17a-18a

APPENDIX B-1:

Text of Building zone ordinance of the Town of Clarkstown, Rockland County, New York 18a-48a

Text of Resolution of the Town Board of the Town of Clarkstown amending the building zone ordinance 48a-51a

APPENDIX B-2:

Text of Sections 261 and 263 of Article 16 of the Town Law of New York 51a

TABLE OF CASES

City of Akron v. Chapman, 160 Ohio St. 382, 116 NE 2d 697 (1953) 14

Charleston Federal Savings & Loan Association v. Alderson, 324 U.S. 182 (1945) 9

State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), cert. den. 280 U.S. 556 (1929) 11, 12, 14

Dewey v. Des Moines, 173 U.S. 193 (1899) 9

Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926) 3, 10

Hadacheck v. Sebastian, 239 U.S. 394 (1915) 10, 12, 13, 15

Jamison v. State of Texas, 318 U.S. 413 (1943) 3

Ex Parte Kelso, 147 Cal. 609, 82 Pac. 241 (1905) 14

Page

John P. King v. City Council of Augusta, 277 U.S. 100 (1928) 3
Marblehead Land Company v. City of Los Angles, 47 F. 2d 528 (9th Cir. 1931), cert. den. 284 U.S. 634 (1931) 11, 12, 14
Nectow v. City of Cambridge, 277 U.S. 183 (1928) ... 10
New York Trap Rock v. Town of Clarkstown, 1 App. Div. 2d 890, 149 NYS 2d 290, Reversed App. Div. 2d Jud. Dept. (not reported), Aff'd. 3 NY 2d 844, 166 NYS 2d 82 2
O'Connor v. City of Moscow, 69 Idaho 37; 202 Pac. 2d 401 (1949) 14
City of Omaha v. Glissman, 151 Neb. 895, 39 NW 2d 828 (1949) 14
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 18
Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919) 10
Reinman v. Little Rock, 237 U.S. 171 (1915) 10
Town of Seekonk v. McHale and Sons, 325 Mass. 271, 90 NE 2d 325 (1949) 14
Standard Oil Co. v. City of Bowling Green, 244 Ky. 362, 50 SW 2d 960 (1932) 14
Standard Oil Company v. City of Tallahassee, 183 F. 2d 410 (5th Cir. 1950), cert. den. 340 U.S. 892 (1950) 10, 12, 13, 14
Village of Terrace Park v. Errett, 12 F. 2d 240 (6th Cir. 1926), cert. den. 273 U.S. 710 (1926) 13, 15
Ex Parte White, 195 Cal. 516, 234 Pac. 396 (1925) .. 14
Whitney v. California, 274 U.S. 357 (1927) 9
Wilson v. Cook, 327 U.S. 474 (1946) 9
Walter A. Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293 (1891) 3
Zahn v. Board of Public Works, 274 U.S. 325 (1927).. 9

FEDERAL STATUTES

U. S. Const. art. VI 4
U. S. Const. amend. XIV, Sec. 1 ..... 3, 4
Federal-Aid Highway Act of 1956, 70 Stat. 386 (1956), 23 U.S.C.A. Sec. 167 20
62 Stat. 929 (1948), 28 U.S.C. Sec. 1257(2) 3, 9
68 Stat. 1244 (1954), 50 U.S.C.A. 404 19
37 Stat. 681 (1913), 30 U.S.C.A. 3 20

STATE STATUTES

Page

Town Law of N.Y. Art. 16, Sec. 261, 263; Vol. 61 McKinney's Consolidated Laws of N.Y., Annotated 5

ORDINANCE

Building Zone Ordinance of the Town of Clarkstown, Rockland County, New York 2, 3, 4, 5, 7, 8, 13, 16, 17, 18

TEXTBOOKS AND OTHER AUTHORITIES

1957 Annual Report of the Secretary of the Interior, p. ix 19

Metzenbaum Law of Zoning, 1577 (2nd ed. 1955) 18

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Appeal from a Decision of the Court of Appeals of the State of New York

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JURISDICTIONAL STATEMENT

PROCEEDINGS AND OPINIONS BELOW

Appellant appeals from a judgment of the Court of Appeals, State of New York, entered on October 24, 1957, affirming a judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department reversing a judgment of the Supreme Court of the State of New York, Rockland County, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

The opinion of the Supreme Court of the State of New York, Rockland County, is unreported but is set

forth in Appendix A. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, is reported at 1 App. Div. 2nd 890, 149 NYS 2d 290.

Copies of the following are attached as Appendix A: (1) the judgment and opinion of the Supreme Court of the State of New York, Rockland County, (2) the judgment and memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, (3) the order, judgment and remittitur of the Court of Appeals of the State of New York dated July 3, 1957, reported in 3 NY 2d 844, 166 NYS 2d 82, and (4) the order of the Court of Appeals, entered October 24, 1957, denying Appellants motion for reargument and amending the remittitur (3 NY 2d 938).

JURISDICTIONAL STATEMENT

This suit was brought in the Supreme Court of the State of New York, Rockland County, to set aside, and to enjoin the enforcement of provisions of zoning ordinance of the Town of Clarkstown, State of New York, as applied to property owned and held by Appellant. The final judgment and amended remittitur of the Court of Appeals of the State of New York was entered on October 24, 1957 and Notice of Appeal was filed in the Supreme Court of the State of New York, Rockland County, on January 22, 1958.

The final order of the Court of Appeals amending the remittitur recited the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether

the Building Zone Ordinance of the Town of Clarkstown deprived appellant of property without due process of law in derogation of the Fourteenth Amendment of the Constitution. This Court held that there was no denial of any constitutional right of appellant."

The jurisdiction of the Supreme Court of the United States to review the decision of the Court of Appeals of the State of New York by direct appeal is conferred by 62 Stat. 929 (1948), 28 U.S.C. Sec. 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *John P. King* v. *City Council of Augusta,* 277 U.S. 100 (1928); *Jamison* v. *State of Texas,* 318 U.S. 413 (1943); *Village of Euclid* v. *Ambler Realty Company,* 272 U.S. 365 (1926). See *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner,* 139 U.S. 293 (1891).

QUESTIONS PRESENTED

1. Whether the provisions of a zoning ordinance enacted by the Town of Clarkstown, New York, prohibiting Appellant from extracting a natural resource, trap rock, owned and held by Appellant at the time the ordinance was enacted and for many years prior thereto solely for the purpose of extraction in the course of the operation of a quarry enterprise Appellant was conducting, and limiting the use of the property containing such trap rock to residence purposes, exceeded the regulatory power of the State of New York and thereby violated the due process clause of Section 1 of Amendment XIV to the Constitution of the United States.

2. Whether the aforesaid power asserted by the State of New York and applied in the zoning ordinance to a company engaged in the extraction of a natural resource, so as to preclude utilization of its natural resource, conflicts with the declared policy of the Federal Government to encourage the maximum utilization of the nation's limited deposits of natural resources and, thus, violates the provisions of Article VI of the Constitution of the United States and the due process clause of Section 1 of Amendment XIV to the Constitution of the United States.

3. Whether the aforesaid provisions of the zoning ordinance, in effect divesting Appellant of one-third of the natural resources then held by Appellant for the operation of its quarry enterprise, which rock for such purpose was worth several hundreds of thousands of dollars to Appellant and limiting the use of the property to residence purposes which made that rock valueless to Appellant, was a taking of Appellant's property without compensation which violated Section 1 of Amendment XIV to the Constitution of the United States.

4. Whether the aforesaid provision of the zoning ordinance limiting the use of Appellant's property, located in a sparsely settled mountainous region of the Town of Clarkstown, to residence purposes in order to reserve such property and the surrounding area for future development as large acreage residential plots was, under the circumstances of this case, an unreasonable exercise of the police power of the State of New York which violated the due process clause of Section 1 of Amendment XIV to the Constitution of the United States.

STATUTES INVOLVED

The Building Zone Ordinance of the Town of Clarkstown, Rockland County, New York, and the resolution of the Town Board of the Town of Clarkstown, amending that Ordinance are set forth in Appendix B-1 hereto.

The pertinent provisions of the "Town Law" of the State of New York (Secs. 261 and 263 of Article 16, of the Town Law of NY.; Vol. 61, McKinney's Consolidated Laws of NEW YORK, Annotated) from which the Town of Clarkstown allegedly derives power to enact and apply the zoning ordinance here involved are set forth in Appendix B-2 hereto.

STATEMENT OF THE CASE

Appellant is a corporation of the State of New York organized for and engaged in the business of quarrying and of producing crushed or broken stone, which has many important uses, particularly in highway construction and in construction generally.

In March 1927 Appellant acquired from The Tomkins Cove Stone Company a quarry and stone crushing plant located partly in the town of Clarkstown, New York, and partly in the Town of Haverstraw, New York. Prior to that time Appellant had acquired, through merger with Upper Hudson Stone Company, adjacent stone-bearing lands. Total lands so acquired were about 236 acres.

In September 1927 Appellant purchased a contiguous tract of stone-bearing land, approximating 41 acres, located in the Town of Clarkstown (hereinafter referred to as Parcel 17) and in 1929 Appellant

purchased an additional tract of stone-bearing land in the Town of Haverstraw.

In March 1927 Appellant commenced quarrying operations, approximately in the middle of the 236 acre tract through which the town line between Clarkstown and Haverstraw runs. Parcel 17, which contains about 20,000,000 cubic yards of quarryable crushed trap rock, and which is separated from the previously acquired 236 acres by Short Clove Road (Route 304, a state highway), was acquired to provide additional stone for Appellant's enterprise.

The principal market for Appellant's production is the Metropolitan area, New York City, about 30 miles from the quarry. The Town of Clarkstown is located near the west bank of the Hudson River, and Appellant's trap rock is transported by scows and barges to the various docks along tidewater in the Metropolitan area.

The production at Appellant's Clarkstown-Haverstraw plant is large. It produces about one-quarter of all the crushed stone used in the area.

Such an operation necessarily entails a large investment in plant and equipment. The plant at Haverstraw which Appellant acquired in 1927 cost $1,000,000 when built in 1926 and there has been a heavy capital investment in additional plant and equipment since then.

To justify such large investment, supplies of rock to provide for long term operation are essential, and since rock is a heavy bulk commodity location near to market, with reduced transportation cost, is necessary.

As of April 1939 Appellant's enterprise included about 70,000,000 cubic yards of quarryable crushed stone, and about 20,000,000 cubic yards, or 29 per cent, was in Parcel 17.

The Town of Clarkstown contains about 40 square miles, and its land is partly mountainous and partly valley land. Appellant's quarry lands are located in the northeastern part of the Town, the mountainous section.

Parcel 17, located north of Short Clove Road, and bounded on one side by the town line between Clarkstown and Haverstraw, is a hill of rock, located in mountainous terrain, rising precipitously from Short Clove Road. It is surrounded by mountainous, rock land, which in 1939, when the zoning ordinance was passed, was sparsely settled and has remained sparsely settled.

In April 1939 the Town of Clarkstown enacted a comprehensive zoning ordinance (Appendix A hereto). As adopted, the ordinance placed all of Appellant's quarry lands, located in Clarkstown, in a "Residence A" district. Generally, uses under Residence A districts are limited to single, detached residences, churches, schools, hospitals, and private clubs; farming and truck gardening and farms for breeding small laboratory animals are permitted.

In June 1939 Appellant petitioned for amendment of the ordinance to place its holdings in an industrial district. And thereafter the ordinance was amended to place Appellant's Clarkstown quarry property located south of Short Clove Road in an Industrial District, but the amendment left Parcel 17 in a "Residence A" district.

The effect of that action was to deny Appellant the right to extract rock from Parcel 17 which had been owned by Appellant for twelve years as part of the quarry enterprise owned and conducted by Appellant since 1927, thereby reducing the resources of that enterprise by approximately 29 per cent. Usable for the purpose intended, the trap rock located in Parcel 17 was worth many hundreds of thousands of dollars to Appellant. By limiting Parcel 17 to residential uses, the ordinance made the trap rock therein worthless to Appellant.

It is a basic characteristic of Appellant's business, as of extractive industries generally, that it can be carried on only where deposits of rock are found. Appellant's is not an ambulatory business. By denying Appellant the right to quarry Parcel 17 as part of its business operations the zoning ordinance, as amended, substantially reduced the resources and size of Appellant's existing enterprise.

In 1943 Appellant commenced suit in the Supreme Court of the State of New York, in its complaint alleging *inter alia* that the classification of Parcel 17 ". . . is not a proper or valid exercise of the police power of the State of New York or of the Town of Clarkstown" and that "said ordinance deprives plaintiff of its property and the use thereof without just compensation."

After trial the Supreme Court of New York held that Parcel 17 was "unreasonably and arbitrarily zoned under the Building Zone Ordinance of the Town of Clarkstown." (Appendix A)

In March 1956 the Appellate Division of the Supreme Court of the State of New York reversed the judgment of the Supreme Court. (Appendix A)

On July 3, 1957 the Court of Appeals of the State of New York affirmed the judgment of the Appellate Division without opinion. On October 24, 1957 the Court of Appeals denied Appellant's motion for reargument, and granted Appellant's alternative motion to amend its remittitur (Appendix A); amending the remittitur in the manner previously described (p. 2, *supra*).

It is clear therefore that the Federal Constitutional questions here presented were raised in and disposed of by the Court of Appeals of the State of New York and are properly before this Court under 62 Stat. 929 (1948), 28 U.S.C. Section 1257(2); *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182 (1945); *Whitney* v. *California*, 274 U.S. 357 (1927); *Dewey* v. *Des Moines*, 173 U.S. 193 (1899); *Wilson* v. *Cook*, 327 U.S. 474 (1946).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. This case presents the question of whether there are *any* federal constitutional limitations on a state's exercise of the police power through a zoning ordinance held valid under state law which denies the use of a natural resource to its owner.

Appellant is, of course, aware that as stated by this Court in *Zahn* v. *Board of Public Works*, 274 U.S. 325 at 328 (1927):

> ". . . the settled rule of this Court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question . . ."

of whether the public welfare is promoted by a zoning ordinance; and that this Court in *Village of Euclid* v.

Ambler Realty Company, 272 U.S. 365 (1926), quoted with approval the language of the Supreme Court of Louisiana in *State ex rel. Civello* v. *New Orleans,* 154 La. 282, 283, 97 So. 440:

> "'. . . We have nothing to do with the wisdom or the good policy of municipal ordinances . . .'"

Nevertheless, since the landmark zoning decisions of this Court in the Law of Zoning of:

Village of Euclid v. *Ambler Realty Company, supra*

Nectow v. *City of Cambridge,* 277 U.S. 183 (1928)

Hadacheck v. *Sebastian,* 239 U.S. 394 (1915)

Reinman v. *Little Rock,* 237 U.S. 171 (1915)

Pierce Oil Corp. v. *City of Hope,* 248 U.S. 498 (1919)

all of which upheld the exercises of state police power there involved, state and local zoning authorities as well as the courts have rarely denied the constitutional propriety of zoning laws which operate to divest or make useless valuable property rights in being at the time of the enactment of the zoning law.

This trend has been further accentuated, Appellant submits, by this Court's denial of certiorari in such extreme instances of upholding the exercise of state police power as are exemplified by:

A. *Standard Oil Company* v. *City of Tallahassee,* 183 F. 2d 410 (5th Cir. 1950), cert. den. 340 U.S. 892 (1950), where Circuit Judge Hutchinson, dissenting, described the zoning ordinance involved as "confiscatory" and observed:

> ". . . I am in no doubt that in sustaining this admittedly confiscatory ordinance, a good general principle, the public interest in zoning, has been run into the ground, the tail of legislative confiscation by caprice has been permitted to wag the dog of judicial constitutional protection."

B. *State ex rel. Dema Realty Co.* v. *McDonald,* 168 La. 172, 121 So. 613 (1929), cert. den. 280 U.S. 556 (1929) where the Court held in effect that from the point of view of the constitutional exercise of the police power a zoning law may remove any business operating as of the time of its enactment from a district zoned residential provided only that a time limit be fixed within which it be moved.

C. *Marblehead Land Company* v. *City of Los Angeles,* 47 F.2d 528 (9th Cir. 1931), cert. den. 284 U.S. 634 (1931), where a zoning law prohibiting extraction of oil which was enacted after the expenditure of substantial sums in the reliance upon a prior ordinance permitting the oil extraction was held to be valid.

These actions of this Court, Appellant respectfully submits, may possibly stand for a proposition which Appellant cannot accept and which Appellant believes this Court does not endorse. This startling proposition is that:

> *No* Federal constitutional protection is available to the owner of business property (with particular reference here to property which is a natural resource) owned at the time of enactment of a zoning ordinance which serves to protect his property interest against an exercise of state police power which is otherwise valid under state law.

This Court has not expressly gone this far. Nor should such implication, technically, be read into its denial of certiorari in such cases as the *Standard Oil, Dema,* and *Marblehead* cases, *supra.* The proposition, however, is patently of such paramount importance not only to natural resource industries generally but to all of the communities, states and individuals which are these days increasingly affected by zoning laws that this Court should not permit it to be implied or assumed—even though mistakenly.

Appellant believes, nevertheless, that however awesome may be the sum total of the police powers of the states and however reluctant this Court may be to inject itself into state policy, the Federal constitution does restrain and limit state police power. Appellant, accordingly, respectfully submits that this is an appropriate case for this Court itself unmistakably to delineate and expose what, if any, limitations the Federal constitution imposes on state police power when it is exercised to deny the usefulness of a natural resource owned as of the time of the enactment of the zoning ordinance for the purpose of satisfying the future raw materials requirements of the business enterprise. If there are *none,* only this Court may and should so declare.

II. The Federal questions here involved were expressly reserved and not decided by this Court in *Hadacheck* v. *Sebastian, supra.* In that case this Court in upholding the validity of a zoning ordinance which prohibited the manufacture of bricks in a given locality stated:

> "In the present case there is no prohibition of the *removal* of the brick clay; only a prohibition

within the designated locality of its manufacture into brick. And to this feature of the ordinance our opinion is addressed. *Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve.*" (Emphasis added)

The ordinance here involved operates to prohibit the removal of Appellant's trap rock from the Parcel 17. Appellant had owned Parcel 17 for twelve years prior to the enactment of the zoning law here involved for the sole purpose of satisfying the future needs of its business—a purpose now entirely thwarted by the zoning law here involved. The zoning law operates, indeed, to prohibit its removal not only by Appellant but by any successor in interest to Appellant. Thus, so long as this ordinance remains in effect the natural resources of the rock deposited by nature in Parcel 17 will be completely denied any usefulness whatsover not only to Appellant but to the community at large. The constitutional implications of such factors as these, having been reserved in *Hadacheck*, should now be considered by the Court.

III. The lower Federal Courts and the high Courts of the States are in conflict on the principal constitutional questions here involved. Thus:

In *Village of Terrace Park* v. *Errett*, 12 F. 2d 240 (6th Cir. 1926), cert. den. 273 U.S. 710 (1926), an anti-gravel removing ordinance was invalidated as unconstitutional; but in *Standard Oil Company* v. *City of Tallahassee*, 183 F. 2d 410 (5th Cir. 1950), cert. den. 340 U.S. 892 (1950), no constitutional principle precluded what the dissenting Justice (see above) denominated "confiscation."

In *Town of Seekonk* v. *McHale & Sons*, 325 Mass. 271, 90 NE. 2d 325 (1949), forbidding extraction of sand and gravel was not unconstitutional; but in *Ex Parte Kelso*, 147 Cal. 609, 82 Pac. 241 (1905), a prohibition of extraction of rock was held not within that State's police power.

In *O'Connor* v. *City of Moscow*, 69 Idaho 37, 202 Pac. 2d 401 (1949), it was held that a zoning ordinance which prohibits the continuation of existing lawful "non-conforming uses" within a zoned area is unconstitutional and to the same effect are such State cases as:

Standard Oil Co. v. *City of Bowling Green*, 244 Ky. 362, 50 SW. 2d 960 (1932)

City of Akron v. *Chapman*, 160 Ohio St. 382, 116 NE. 2d 697 (1953)

Ex Parte White, 195 Cal. 516, 234 Pac. 396 (1925)

City of Omaha v. *Glissman*, 151 Neb. 895, 39 NW. 2d 828 (1949)

But in *State ex rel. Dema Realty Co.* v. *McDonald*, 168 La. 172, 121 So. 613 (1929), cert. den. 280 U.S. 556 (1929), the compulsory discontinuance of a non-conforming use was upheld as it was also upheld and certiorari denied in *City of Tallahassee* and *Marblehead Land Co., supra.*

IV. The Federal questions here involved are particularly substantial because despite the confusion in the lower courts (see above) no decision of this Court has heretofore dealt with the limitations, if any, imposed by the Federal Constitution on the exercise of state police power through zoning laws in their application to the natural resources or extractive

industries. *Hadacheck, supra,* as noted above expressly reserved such question.

Appellant's business enterprise is entirely dependent on the natural resource—the rock—for its continuance. It must quarry rock where it can find it—where nature has deposited it in the earth. It cannot remove or discontinue its operations to other locations at the whim of zoning authorities as can manufacturers, filling station or livery station operators, or other businesses which are not dependent upon natural resources in place. Appellant is in short a "non-ambulatory" enterprise and it was precisely because of these considerations that Appellant acquired Parcel 17 and its other rock bearing lands.

In *Village of Terrace Park* v. *Errett*, 12 F. 2d 240 (6th Cir. 1926), cert. den. 273 U.S. 710 (1926), the Sixth Circuit in holding that a zoning ordinance which precluded extraction of gravel to be an unconstitutional taking of property and not merely a regulation of the property's use recognized (as did *Hadacheck, supra*) this very important distinction when it said at 243:

> "There is also a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage, and an ordinance that wholly deprives the owner of land of its valuable mineral content. This difference was recognized by the Supreme Court in *Hadacheck* v. *Los Angeles*, 239 U.S. 394 . . ."

If state police power be constitutionally so broad and unlimited as to authorize a nullification of Appellant's right to extract its rock from the ground, the states may then entirely without Federal constitutional objection prohibit all or any of this

Country's vast extractive industries from removing the natural resources which they work. The future availability and usefulness of the Country's reserves of coal, oil, timber, water, uranium, ferrous and non-ferrous metals, as well as the non-metallic minerals such as rock, gravel, sand, etc., is therefore in jeopardy under the principles here involved. Additionally, the very common practice in all these industries, as with Appellant here, to provide against the future by the acquisition through exploration and development of reserves of the natural resources is defeated.

Moreover, if such state power be constitutional no processor of a valuable natural resource can insure future availability of needed reserves of raw material by acquiring new reserves. For if he were zoned out of one reserve and was fortunate enough to acquire a substitute reserve he could have no assurance that subsequent to his acquisition of the second reserve a state zoning law might not entirely preclude its use. Denial of use of the natural resource at one location cannot assure a future right to use at a substitute location. Rather, the converse is true, since if the power to deny the use exists, it exists as to *all* locations where the resource may be found.

V. Important questions under the Federal Constitution of deprivation, if not confiscation, of private property are involved. This becomes the more clear when it is recognized that under the facts here involved, the effect of the zoning ordinance is to deny Appellant the right to use the valuable natural resource on which its business depends. So long as the ordinance continues in effect neither Appellant nor anyone else may extract or otherwise use the rock

contained in Parcel 17. Quantity wise, the rock in Parcel 17 approximates 30 per cent of the total rock owned by Appellant and available for processing at this quarry. The ordinance operates as an absolute prohibition of the removal of that rock. Appellant, under the ordinance, has no alternative but to allow it to remain in its natural deposit. *All* use of the rock is precluded.

Under these circumstances, Appellant submits, constitutional absolution may not be accorded the state on the theory that a zoning law does not constitute prohibition of use but constitutes merely regulation of use of the property. The regulation says that Parcel 17 may be used for residences but in so saying it necessarily and inherently prohibits the use of the rock in Parcel 17 which underlies the surface on which the residences would be erected. Nor is it any justification of the state's exercise of police power to assert that the ordinance is reasonable or made necessary by the health, safety or general welfare of the State of New York. In fact, this record contains no evidence that the zoning authorities gave any consideration whatsoever to the effect on the community or the State of the elimination of this large tonnage of a valuable natural resource from their economies.

On the record involved herein the primary purpose of the zoning ordinances was aesthetic—the preservation of scenic beauty in the area. Involved is that part of the Hudson River Palisades featured in the popular play of Maxwell Anderson called "High Tor." The major emphasis of the testimony of record is that the citizens of this sparsely settled area feared that removing the rock from Parcel 17 would mar the scenic beauty of the terrain.

According to Metzenbaum, Law of Zoning, 1577 (2nd ed., 1955):

> "As the concept and definition of 'public welfare' has expanded, so, too, regard for aesthetic considerations have been more hospitably accepted as having a growing consideration in the philosophy of zoning."

But this case involves, *inter alia,* the question of whether such increased "hospitality" can possibly justify in the constitutional sense the type of "taking" or "confiscation" here involved. The plain and unmistakable fact is that the ordinance entirely withdraws from the economy of the State of New York as well as from the use and control of Appellant a significant quantity of an important natural resource. This, Appellant submits, the State of New York in the exercise of its police power may not do under the XIV Amendment of the Federal Constitution. This question has not heretofore received the attention of this Court and its clear importance demands that it should.

What Mr. Justice Holmes said in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 at 414 (1922), concerning another natural resource—coal—is most apposite:

> "It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case: 'For practical purposes, *the right to coal consists in the right to mine it.*' Com. ex rel. Keator v. Clearview Coal Co., 256 Pa. 328, 331, L.R.A. 1917E, 672, 100 Atl. 820. What makes the right to mine coal valuable is that it can be exercised with profit. *To make it commercially*

impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does." (Emphasis added)

VI. The concern of the Federal Government with the effective utilization and conservation of the nation's natural resources including rock and the crushed rock aggregates produced from it cannot be doubted. As the 1957 Annual Report of the Secretary of the Interior states, page ix:

> "The dynamic economic strength of modern-day America depends upon the full and creative development of our country's natural resource base. . . .
>
> "Our resources, however, are far from inexhaustible, and as our national output rises, corresponding depletions are made in the storehouse of nature's bounty.
>
> ". . . Our Nation, however, must work creatively to provide for the realistic development of its natural resource base in order to meet the growing demands of today's citizens and to pass along our resource heritage to generations of unborn Americans."

Congress has established (68 Stat. 1244 (1954), 50 U.S.C.A. 404) an Office of Defense Mobilization charged *inter alia* with the function of advising the President as to:

> "(2) programs for the effective use in time of war of the Nation's natural and industrial resources for military and civilian needs, for the maintenance and stabilization of the civilian economy in time of war, and for the adjustment of such economy to war needs and conditions;"

Indeed, in the Act establishing the Bureau of Mines of the Department of the Interior, the Congress of the United States has expressly directed (37 Stat. 681 (1913), 30 U.S.C.A. 3):

> "It shall be the province and duty of the Bureau of Mines . . . to conduct inquiries and scientific and technologic investigations . . . with a view to . . . conserving resources through the prevention of waste in . . . quarrying . . ."

And since highways cannot be built without crushed stone, a more definitive example of real Federal interest appears in Public Law 627—84th Congress known as the "Federal-Aid Highway Act of 1956", 70 Stat. 386 (1956), 23 U.S.C.A. Sec. 167, wherein:

> "It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the Interstate System, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, the national and the civil defense."

Appellant recognizes that because the typical zoning case involves a weighing of local interests only, such cases are not ordinarily appropriate for presentation to this Court.

Here, however, the state has prohibited absolutely the extraction and use of a valuable natural resource and it has done so, insofar as this record shows, solely on the basis of factors peculiar to the local community —the Town of Clarkstown. Obviously, if such unlimited power resides in local authorities and if it may be exercised without regard to considerations of more than local concern, the national interest in achieving the maximum exploitation of our limited deposits of natural resources is in serious danger of

frustration. For what the Town of Clarkstown can do, all other communities across the nation can do.

Appellant submits, on the contrary, that the utilization of the nation's natural resources is a matter which transcends the interests of the local community. We submit further that, while local regulatory bodies may under appropriate circumstances control the method by which natural deposits are withdrawn from the ground, they may not, absent compelling reasons not shown here, absolutely prohibit their extraction. For when they do so, they subordinate national to local interests.

State action taken in disregard of such material and compelling considerations may properly be said, we believe, to be arbitrary and unreasonable in the constitutional sense.

CONCLUSION

By reason of the foregoing the questions here presented are so substantial as to require plenary consideration with brief on the merits and oral argument for their resolution.

Respectfully submitted,

JOHN F. LANE

JOSEPH DIEHL FACKENTHAL

Counsel for Appellant

Of Counsel

GALL, LANE AND HOWE
401 Commonwealth Building
1625 K Street, N. W.
Washington 6, D. C.

March 21, 1958

APPENDIX A

Judgment of Supreme Court of New York

SUPREME COURT OF THE STATE OF NEW YORK

County of Rockland

NEW YORK TRAP ROCK CORPORATION, *Plaintiff*,

against

THE TOWN OF CLARKSTOWN in the County of Rockland in the State of New York; the TOWN BOARD OF THE TOWN OF CLARKSTOWN and ROSWELL P. BLAUVELT, JOHN DICKENMAN, ARTHUR GOEBEL, JOHN GILCHRIST and FRED M. SCHMERSAHL, as Members of said Town Board, and JOHN ELLIOTT, as Building Inspector of the Town of Clarkstown, *Defendants*.

Judgment

The issues presented, after severance and direction of separate trial, by the complaint and the amended answer in the above entitled action having duly and regularly come on for trial before Mr. Justice Frank C. Coyne at a Special Term of this Court held on the 14th, 15th, 18th, 19th, 20th, 21st, 27th, 28th and 29th days of January, 1954, at the County Court House in New City in the County of Rockland, and the plaintiff having appeared therein by A. J. Bryant, its attorney, and the defendants having appeared by Edward G. Roepe, their attorney, and the proofs and allegations of the parties having been heard and due deliberation having been had, and the Court having on the 15th day of July, 1954, duly made and filed its opinion in writing stating the facts which it deemed essential and directing judgment as hereinafter set forth, and neither party having submitted proposed findings of fact, and the plaintiff's costs having been adjusted at Eighty Dollars ($80.00),

Now, on motion by A. J. Bryant, attorney for the plaintiff, it is

ORDERED, ADJ' ', DECLARED AND DECREED:

1. That the owned by the plaintiff in the Town of Clarkstown e time of the adoption of said Building Zone Ordina and Map, on April 4, 1930, consisting of approximatel orty-three (43) acres and more particularly described as llows:

> "Be ing at a point on the Town Line between the To f Clarkstown and the Town of Haverstraw fifteen red (1500) feet north of the intersection of said t line and the Short Clove Road and running thence Westerly approximately at a right angle to said Town Line to and along an old stone wall approximately fifteen hundred and fifty (1550) feet to a corner of this stone wall; thence Southeasterly along an old stone wall approximately sixteen hundred (1600) feet to the end of the stone wall at an intersection with another stone wall; thence Southerly along said other stone wall approximately two hundred and fifty (250) feet to the intersection of the Short Clove Road and the Scratch Up Road thence Easterly along the center of the Short Clove Road to said town line and thence Northerly along said town line to the point or place of beginning."

is unreasonably and arbitrarily zoned under the Building Zone Ordinance of the Town of Clarkstown.

2. That upon said tract, which by said Ordinance was placed in a Residence "A" District, plaintiff was, at the time of the adoption of said Ordinance, carrying on a non-conforming use, to wit: operating a stone quarry as part of a larger indivisible tract.

3. That as to the tract above described there is a vested right to continue the non-conforming use to which it was devoted prior to and at the time of the adoption of the said Building Zone Ordinance; and further

ORDERED, ADJUDGED AND DECREED, that defendant Town and the individual defendants and their several successors in office be and they hereby are restrained and enjoined from interfering with, preventing or attempting to prevent the carrying on of said non-conforming use upon said lands of plaintiff or any part thereof; and further

ORDERED, ADJUDGED AND DECREED that the plaintiff recover of the defendants the sum of Eighty Dollars ($80.00), the costs of this action adjusted as aforesaid, and have execution therefor.

Judgment entered this 4th day of October, 1954.

Approved for entry this 1st
day of October, 1954.

FRANK H. COYNE
J. S. C.

Opinion of the Supreme Court of New York

SUPREME COURT OF THE STATE OF NEW YORK

County of Rockland

NEW YORK TRAP ROCK CORPORATION, *Plaintiff*,

against

THE TOWN OF CLARKSTOWN in the County of Rockland in the State of New York; the TOWN BOARD OF THE TOWN OF CLARKSTOWN and ROSWELL P. BLAUVELT, JOHN DICKENMAN, ARTHUR GOEBEL, JOHN GILCHRIST and FRED M. SCHMERSAHL, as Members of said Town Board, and JOHN ELLIOTT, as Building Inspector of the Town of Clarkstown, *Defendants*.

Opinion by Coyne, J.

This action is brought by the New York Trap Rock Corporation to obtain an adjudication that the zoning ordinance of the Town of Clarkstown, Rockland County, is void and of no effect as to certain of plaintiff's land located in the Town; and to enjoin defendants (The Build-

ing Inspector, the Town Board and individual members thereof) from enforcing the ordinance as to said land. The protracted period which has elapsed between the commencement of the action and the trial has been consumed in the litigation of procedural questions.

The pleadings in the present action have previously received consideration in the Appellate Courts. The Answer of the defendants originally contained a purported affirmative defense to the effect that the operations of the plaintiff constituted a nuisance; and also invoked the pleaded new matter as a counterclaim seeking judgment enjoining plaintiff from operating a quarry on its property in the Town of Clarkstown. On appeal from the order of the Special Term denying plaintiff's motion to dismiss the affirmative defense and counterclaim, the Appellate Division reversed the order and struck out the defense and dismissed the counterclaim upon the ground of insufficiency. Upon appeal, the Court of Appeals modified the order of the Appellate Division to the extent of affirming that portion of the order striking out the affirmative defense, and reversing that portion of the order dismissing the counterclaim. By order subsequently entered the issues raised by a denial of the allegations of the complaint were severed from the issues raised by the counterclaim and reply. While the court extended considerable latitude in the reception of evidence at the trial, the only issues remaining for determination are those raised by the denials of the allegations of the complaint. The issues raised by the affirmative defense are out of the case. The issues raised by the counterclaim and reply have been severed from the main issues and are not before the Court.

After trial, the court finds the following facts which it deems essential to its decision: the plaintiff is a domestic corporation organized for the purpose of carrying on the business of quarrying, producing and selling crushed or broken stone. The plaintiff is a leader in its

particular field in this area and for many years has owned and operated quarrying plants in Ulster, Orange, Dutchess, Westchester and Rockland Counties. Sometime in the early 1920's, plaintiff's predecessor in title, the Tomkins Cove Company, purchased trap rock bearing lands in the Towns of Clarkstown and Haverstraw in the County of Rockland. Upon this land, the Tomkins Cove Company erected a plant and operated a quarry for the production of crushed trap rock. Plaintiff purchased this property from the Tomkins Cove Company early in 1927; and upon this land, and upon other contiguous land previously acquired, plaintiff has continuously carried on the business of quarrying and crushing stone. After acquiring this plant from the Tomkins Cove Company, plaintiff purchased additional stone-bearing lands to the north of Short Clove Road. Part of this land is located in the Town of Haverstraw and part in the Town of Clarkstown. It is the latter land (Plaintiff's Ex. 6, parcel 17), purchased in September, 1927 which is involved in the present action. Plaintiff's purpose, and the court so finds, in acquiring this land was to quarry stone thereon, and to provide a reserve field for its quarrying operations.

On April 4th, 1939, the Zoning Ordinance of the Town of Clarkstown was adopted. Under the zoning ordinance, all of the plaintiff's land located in the Town of Clarkstown was placed in a Residential "A" District. Thereafter, upon petition of plaintiff, the zoning ordinance was amended (October 28th, 1940) so as to place the lands of plaintiff located south of Short Clove Road in an Industrial District, and its lands located north of Short Clove Road (the subject property) in a Residential "A" District.

The subject property consists of a parcel of land approximately forty-one acres in size, bounded on the south by Short Clove Road, on the east by the Town line between the Towns of Haverstraw and Clarkstown, on the north

by lands formerly owned by one Van Orden, and on the west by other lands formerly owned by plaintiff. The latter lands was acquired by plaintiff subsequent to the adoption of the zoning ordinance and is not involved in the present action. Topographically, the subject property is precipitous, rising from Short Clove Road at a grade of approximately thirty-eight per cent. It constitutes for the most part a block of solid stone. It is estimated by plaintiff's expert that the subject property contains 20,000,000 cubic yards of stone. At the time the zoning ordinance was enacted, the plaintiff-corporation was engaged in actual quarrying on its land located south of the Short Clove Road. It does not appear that there was actual quarrying on the subject property located north of the Short Clove Road.

Plaintiff contends that the subject property is included in an area devoted to a prior, pre-existing, non-conforming use protected under the pertinent provisions of the zoning ordinance (Section 4, Subs. B and C); and further, that the zoning ordinance in so far as it applies to plaintiff's property is unreasonable, arbitrary, and unconstitutional in that the subject property is not suitable or adaptable for the uses and purposes for which it is now zoned. While conceding that there was no actual quarrying taking place on the subject property at the time the ordinance was adopted, plaintiff urges that its property north and south of the Short Clove Road was one, single, indivisible tract devoted to its quarrying business, the whole of which was protected by a vested non-conforming use.

Conversely defendants contend that the zoning ordinance challenged by plaintiff was designed to further the general welfare of the community under a comprehensive plan, and that the ordinance is fair and reasonable in its application to plaintiff's property. Defendants also assert that the Short Clove Road is a natural boundary between the

property of plaintiff located north of the road and that located south of the road and that for the purposes of the zoning ordinance the parcels are separate and divisible.

It is the law of this state that nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance. *People* v. *Miller*, 304 N. Y. 105, 107, and cases cited therein. Non-conforming uses will be permitted to continue despite the enactment of a prohibitory zoning ordinance if enforcement of the ordinance would, by rendering valueless substantial improvements or business built up over the years, cause serious financial harm to the property owner. It is only where the resulting loss to the property owner is relatively slight and insubstantial that a zoning regulation will be sustained against a prior and pre-existing nonconforming use.

In the present case, no one can gainsay the fact that plaintiff and its predecessor in title were operating a quarry, at least on its property south of the Short Clove Road, for many years prior to the adoption of the zoning ordinance. Nor can it be denied that plaintiff's investment in land and equipment is a substantial one, estimated as upwards of $1,000,000.

The Court does not agree with defendant's contention that the subject parcel is divisible, for zoning purposes, from the remainder of plaintiff's property lying south of the Short Clove Road. The fact that the Short Clove Road cuts through plaintiff's property does not impair the unity of the tract. Nor is the fact that actual quarrying was confined to the property south of the road controlling. The true test is whether the subject property is an integral part of plaintiff's entire quarry property. Manifestly, the business of stone quarrying is a progressive operation. Necessarily, a reserve area must be set aside for prospective expansion, when the area actively being worked is depleted. While the subject property was not actually

being worked at the time the ordinance was enacted, in the normal course of operations, it would ultimately be reached and its supply of raw materials extracted. Under the present zoning regulation, the subject property is of no practical or potential value to plaintiff; and this despite the fact that it contains an estimated 20,000,000 cubic yards of quarryable rock worth approximately $1,000,000 to plaintiff in its business.

In *Lamb, Mayor,* v. *A. D. McKee, Inc.,* 10 N. J. Misc. 649, 160 A. 563, the Supreme Court of the State of New Jersey, passed upon a similar situation. There the Court passed upon an appeal from orders of the Bergen County Court setting aside four convictions for a violation of a zoning ordinance of the Borough of Ho-Ho-Kus. The defendant was the owner of a ten-acre tract of land in the borough, acquired prior to the adoption of the Enabling Act. He was extracting sand gravel from the tract, although at the time of the passage of the ordinance, only one acre was being worked. After the Enabling Act was adopted, the defendant continued to make excavations from other portions of the tract. Complaints were made and convictions resulted. On Appeal, the Court held in substance that the non-conforming use exercised by the defendant was lawful when instituted and actively and constantly maintained, and therefore was entitled to be continued under the ordinance. Answering the Prosecutor's contention that only part of the tract was being operated at the time of the enactment of the ordinance, the Court stated: "We think the tract as a whole was used for excavating purposes even though only a part of it was actually being dug. Under the Prosecutor's reasoning, a land owner would be entitled to continue a previous non-conforming use only on the precise spot where it was being done. * * * We think that the tract was a single unit, and that it was being put to a nonconforming use as a whole before the act of 1928 was passed."

The *Lamb* case is cited with approval in the case of *DeFelice, et al.* v. *Zoning Board of Appeals of Town of East*

Haven, 130 Conn. 156, 32 A. 2nd 635. In this latter case, an appeal was taken from a determination of the defendants denying permission to plaintiffs to construct and erect a wet sand classifier on their property. The Court there defined the term "existing use" as follows: " • • • Existing use should mean the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose. Citing *Haller Baking Co.'s Appeal*, 295 Pa. 257, 145 A. 77, 79. The Court further stated" • • • Nor is it essential that as exercised it shall have utilized the entire tract. Citing *Lamb, Mayor*, v. *A. D. McKee, Inc., supra.* See also, *Struyk* v. *S. Braen's Sons*, 17 N. J. Super. 1, 85 A. 2d 279.

Under the evidence and the established law, this Court is of the opinion that the subject property and the remaining quarry property of the plaintiff located south of the Short Clove Road are one entire, indivisible tract, the whole of which is entitled to the protection of the vested nonconforming use.

In view of this holding, no purpose will be served by passing upon plaintiff's further contention respecting the peculiar suitability of the subject property for the particular uses permitted by the zoning ordinance. Allusion is made thereto solely as obiter dicta. In this connection, the language of the Court in *Cordts* v. *Hutton Company*, 146 Misc. 10 (affd. 241 App. Div. 648, affd. 266 N. Y. 399) is germane • • • "All pertinent factors affecting the premises involved must be considered in determining whether the premises are reasonably suitable for residential purposes. A conclusion that the premises involved here are patently unsuitable for residential purposes is sustained by the evidence as to their physical characteristics, their immediate proximity to the brick plants of the defendants and the character of the locality as evidenced by its history over a long period of years." Certainly, mere aesthetic considerations alone do not justify the restriction imposed. *Dowsey* v. *Village of Kensington*, 257 N. Y. 221.

Judgment granted in favor of plaintiff in accordance with the foregoing, with costs. Settle decision and judgment on notice. The transcript of the testimony, the exhibits, and briefs have been filed with the Clerk of Special Term, Part I, Westchester County, where they may be picked up by counsel.

Dated: July 15th, 1954.

Enter in Rockland County

FRANK H. COYNE
Justice of the Supreme Court

Judgment of Appellate Division

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 5th day of March, 1956.

Present:

Hon. George J. Beldock,
Acting Presiding Justice.
Hon. Charles E. Murphy,
Hon. Henry L. Ughetta,
Hon. James T. Hallinan,
Hon. Philip M. Kleinfeld,
Justices.

NEW YORK TRAP ROCK CORPORATION, *Respondent*,

vs.

THE TOWN OF CLARKSTOWN in the County of Rockland in the State of New York; the TOWN BOARD OF THE TOWN OF CLARKSTOWN and ROSWELL P. BLAUVELT, JOHN DICKENMAN, ARTHUR GOEBEL, JOHN GILCHRIST and FRED M. SCHMERSAHL, as Members of said Town Board, and JOHN ELLIOTT, as Building Inspector of the Town of Clarkstown, *Appellants*.

Judgment

The above-named, The Town of Clarkstown, in the County of Rockland in the State of New York, The Town Board of the Town of Clarkstown, and Roswell P. Blauvelt, John Dickenman, Arthur Goebel, John Gilchrist and Fred M. Schmersahl as Members of said Town Board, and John Elliott as Building Inspector of the Town of Clarkstown, the defendants in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Rockland on the 4th day of October, 1954, which, among other things, declares invalid so much of the building zone ordinance of the Town of Clarkstown as places "parcel 17," owned by respondent, in a "Residence 'A' District," herein, and the said appeal having been argued by Mr. Lester D. Stickles of counsel for appellants, and argued by Mr. Joseph Diehl Fackenthal of counsel for respondent, and submitted by Mr. David H. Moses of counsel for West Nyack Trap Rock Company, Inc., as *amicus curiae*, and due deliberation having been had thereon; and upon the opinion and decision slip of the Court herein, heretofore filed:

It is Ordered and Adjudged that the judgment so appealed from be and the same hereby is unanimously reversed on the law and the facts, with costs, and complaint dismissed, with costs, and it is

Further Ordered that the findings of fact contained in the decision of the Trial Court insofar as they are inconsistent herewith, are hereby reversed, and it is

Further Ordered that new findings are made as are indicated in the opinion and decision slip of this court dated March 5th, 1956, which is expressly referred to for the purpose provided in Section 607 of the Civil Practice Act.

Enter:

JOHN J. CALLAHAN
Clerk.

Upon the foregoing order as entered, it is

FURTHER ORDERED, that the defendants-appellants, Town of Clarkstown and Roswell P. Blauvelt, John Dickenman, Arthur Goebel, John Gilchrist and Fred M. Schmersahl as Members of said Town Board, and John Elliott as Building Inspector of the Town of Clarkstown, recover judgment against the plaintiff-respondent, New York Trap Rock Corporation, with principal office at 230 Park Avenue, New York, N. Y., in the sum of $2,645.39 being the amount of the costs as taxed herein and for which execution may issue therefor.

Dated: New York City, N. Y., Apr. 2, 1956.

AUGUST H. HANSEN
Clerk

By EDITH M. SMITH
Deputy

Memorandum Opinion of Appellate Division

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 5th day of March, 1956.

NEW YORK TRAP ROCK CORPORATION, *Respondent*,

vs.

THE TOWN OF CLARKSTOWN in the County of Rockland in the State of New York; the TOWN BOARD OF THE TOWN OF CLARKSTOWN and ROSWELL P. BLAUVELT, JOHN DICKENMAN, ARTHUR GOEBEL, JOHN GILCHRIST and FRED M. SCHMERSAHL, as Members of said Town Board, and JOHN ELLIOTT, as Building Inspector of the Town of Clarkstown, *Appellants*.

Opinion

New York Trap Rock Corporation, respondent, v. The Town of Clarkstown, in the County of Rockland in the State of New York, The Town Board of the Town of Clarkstown,

and Roswell P. Blauvelt, John Dickenman, Arthur Goebel, John Gilchrist and Fred M. Schmersahl as members of said Town Board, and John Elliott as Building Inspector of the Town of Clarkstown, appellants.

Appeal from a judgment which, among other things, declares invalid so much of the building zone ordinance of the Town of Clarkstown as places "parcel 17," owned by respondent, in a "Residence 'A' District." Judgment reversed on the law and the facts, with costs, and complaint dismissed, with costs. Findings of fact insofar as they may be inconsistent herewith are reversed and new findings are made as indicated herein.

After a merger with the builder of a million-dollar plant to quarry and produce crushed trap rock, respondent began operations in March, 1927, on a tract of approximately 240 acres situated on the southerly side of a state highway known as Short Clove Road. In September, 1927, respondent bought parcel 17, a tract of about 47 acres on the north side of said highway, with a house on it, for $11,000. The house was torn down and said parcel remained unused at least unitl 1939. In that year the Town of Clarkstown for the first time adopted a comprehensive building zone ordinance to provide for a planned and orderly development of the town. Thereby said parcel 17 and the quarry property were placed in a residence "A" district, wherein quarrying is prohibited, except as may be permitted by the board of appeals pursuant to an application by the owner for a certificate of occupancy. By an amendment, the quarry property only was placed in an industrial district, wherein quarrying is permitted. At the time said ordinance was adopted, about 100 houses, mostly of high quality, were in existence in the area. The terrain of parcel 17 is similar to that of other residential property in the vicinity. Upon all the proof in the record, we find that said parcel is suitable for residential purposes.

In our opinion, at the time the ordinance was adopted, respondent had no vested right to quarry on parcel 17.

It had neither made a substantial investment with a view towards quarrying on said parcel nor made any substantial use of said parcel for such purpose (*Town of Somers* v. *Camarco*, 284 App. Div. 979, affd. 308 N.Y. 537; *People* v. *Miller*, 304 N.Y. 105; *People ex rel. Ortenberg* v. *Bales*, 224 App. Div. 87, affd. 250 N.Y. 598).

The ordinance is not unreasonable by virtue of its prohibition of the removal of rock from parcel 17 (*Burlington Dunn*, 318 Mass. 216, certiorari denied 326 U. S. 739; *Seekonk* v. *John J. McHale & Sons, Inc.*, 325 Mass. 271, 274), especially since the board of appeals is empowered thereby to permit such removal (*People* v. *Calvar Corporation*, 69 N. Y. S. 2d 272, affd. 286 N. Y. 419). Moreover, since it does not appear that respondent applied for such permit, it is precluded from attacking the validity of the ordinance for such prohibition at this time (*People* v. *Calvar Corporation, supra; Matter of Brous* v. *Smith*, 304 N. Y. 164, 171).

The zoning of parcel 17 in a Residence "A" district is not unreasonable because aesthetic considerations were taken into account in the formulation of the comprehensive zoning plan (*Dowsey* v. *Village of Kensington*, 257 N. Y. 221; *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288); and in view of the harm to the community inherent in the unlimited extension of such quarrying operations as respondent's, the fact that parcel 17 is worth considerably more for quarrying than for residential purposes does not invalidate the ordinance (*Shepard* v. *Village of Skaneateles*, 300 N.Y. 115; *Ulmer Park Realty Co.* v. *City of N. Y.*, 270 App. Div. 1044). Finally, respondent has not met its burden of showing that the ordinance is invalid (*Johnson* v. *City of N. Y.*, 274 N. Y. 411; *Matter of Kings County Lighting Co.* v. *Maltbie*, 244 App. Div. 475, 478). Present: Beldock, Acting P. J.; Murphy, Ughetta, Hallinan and Kleinfeld, JJ.

Filed Nov. 14, 1957

Order, Judgment and Remittitur of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of July in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

WITNESS,

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

Remittitur July 3, 1957.

No. 329

NEW YORK TRAP ROCK CORPORATION, *Appellant*,

vs.

THE TOWN OF CLARKSTOWN IN THE COUNTY OF ROCKLAND IN THE STATE OF NEW YORK, & ORS. &c., *Respondents.*

BE IT REMEMBERED, That on the 16th day of November in the year of our Lord one thousand nine hundred and fifty-six, New York Trap Rock Corporation, the appellant—in this cause, came here unto the Court of Appeals, by A. J. Bryant, its attorney—,and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The Town of Clarkstown in the County of Rockland in the State of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Edward G. Roepe, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Joseph Diehl Fackenthal, of

counsel for the appellant—, and by Mr. Lester D. Stickles, of counsel for the respondents, brief filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, July 3, 1957.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

Entered Nov. 14, 1957 3:30 P.M.
AUGUST H. HANSEN
Clerk.

(SEAL)

STATE OF NEW YORK
ROCKLAND COUNTY CLERK'S OFFICE } ss.

I, AUGUST H. HANSEN, Clerk of said County, hereby certify that I have compared the foregoing copy of Remititur: New York Trap Rock Corp., vs. Town of Clarkstown with the original now filed Nov. 14, 1957 in said office, and find the same to be a true and correct transcript therefrom and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said County this 7th day of January, 1958.

AUGUST H. HANSEN
Clerk

Order of the Court of Appeals Denying Appellants Motion for Rehearing and Amending the Remittitur

STATE OF NEW YORK IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-fourth day of October A. D. 1957.

Present, HON. ALBERT CONWAY, *Chief Judge, presiding.*

Mo. No. 411

NEW YORK TRAP ROCK CORPORATION, *Appellant,*

vs.

THE TOWN OF CLARKSTOWN, in the County of Rockland in the State of New York; THE TOWN BD. OF THE TOWN OF CLARKSTOWN and ors., members of said Town Bd. and JOHN ELLIOTT, as Building Inspector of the Town of Clarkstown, *Respondents.*

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore

made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the Building Zone Ordinance of the Town of Clarkstown deprived appellant of property without due process of law in derogation of the Fourteenth Amendment of the Constitution. This Court held that there was no denial of any constitutional right of appellant.

AND the Supreme Court, Rockland County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

APPENDIX B-1

BUILDING ZONE ORDINANCE

of the

Town of Clarkstown

Rockland County

New York

Final Zoning Map filed by the Zoning Commission in the office of the Town Clerk of the Town of Clarkstown

on March 4th, 1939, together with the Final Report of said Zoning Commission.

Dated: March 4th, 1939.

F. G. DAVIDSON,
DORIS W. STONE,
LOUIS RICHARD,
EUGENE L. BLAUVELT,
HAROLD S. DEMING,
Zoning Commission of the
Town of Clarkstown.

Filed March 4, 1939.

KATE BUCHENAU,
Town Clerk.

At a meeting of the Town Board of the Town of Clarkstown, held on April 4th, 1939, the following resolution adopting a Zoning Ordinance for said Town was unanimously adopted, viz.:

"RESOLVED, that the Zoning Ordinance proposed and recommended in the Final Report of the Zoning Commission, dated March 4th, 1939, as hereinafter set forth, be and the same hereby is adopted as and for the Zoning Ordinance of the Town of Clarkstown, including the proposed Zoning Map now on file in the office of the Town Clerk of the Town of Clarkstown."

BUILDING ZONE ORDINANCE
of the
Town of Clarkstown,
Rockland County,
New York.

AN ORDINANCE

Classifying, regulating and restricting the height, number of stories and size of buildings and other structures, the

percentage of lot that may be occupied, the size of yards and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence and other purposes; establishing the boundaries of districts for said purposes; and providing fines and penalties for violations; so as to promote the health, safety, morals or general welfare of the Town of Clarkstown.

SECTION 1. CLASSES OF DISTRICTS.

For the purpose of this Ordinance the town of Clarkstown is hereby divided into six classes of districts as follows:

"Residence A" Districts
"Residence B" Districts
"Residence C" Districts
"Business A" Districts
"Business B" Districts
Industrial Districts

SECTION 2. BOUNDARIES OF DISTRICTS.

A. The boundaries of each of the created districts or zones are hereby established as shown on a map entitled "Building Zone Map, Town of Clarkstown," dated and signed by the Supervisor and the Town Clerk, which map accompanies and is hereby declared to be a part of this Ordinance.

B. District Boundary Lines. The district boundary lines are intended generally to follow street lines, existing lot lines, or their projections or corporate boundary lines as indicated on the Building Zone Map; but where a boundary line does not follow such a line, its position is shown on said map by means of figures expressing distance in feet from a street line or other boundary line as indicated.

SECTION 3. DEFINITIONS AND METHODS OF DETERMINATION.

Certain words and phrases are used in this Ordinance for the purpose hereof and are defined as follows:

A. Words used in the present tense include the future tense; the singular number includes the plural and the plural the singular; the word "lot" includes the word "plot"; the word "building" includes the word "structure"; the word "occupied" includes words "designed" or "intended to be occupied"; the word "used" includes the words "arranged," "designed" or "intended to be used."

B. Lot. A "lot" is a parcel of land upon which a principal building and its accessories are, or may be placed, together with the required open spaces.

C. Corner Lot. A "corner lot" is a lot at the junction of, and fronting on two or more intersecting streets.

D. Through Lot. A "through lot" is any lot which runs through from one street to another.

E. Lot Line. A "lot line" is any boundary line of a lot.

F. Street Line. A "street line" is the dividing line between the street and the lot.

G. Depth of Lot. The "depth of a lot" is the mean distance between its mean front street line and its mean rear line. The greater frontage of a corner lot is its depth and its lesser frontage is its width.

H. Width of Lot. The "width of a lot" is its mean width measured substantially at a right angle to its mean depth.

I. Front Yard. A "front yard" is an open, unoccupied space on the same lot with a building and situated between the street wall of the building and the street line of the lot.

J. Rear Yard. A "rear yard" is an open space lying between the rear lot line and the rear wall of a building and running entirely across the lot to the two side lot lines.

K. Side Yard. A "side yard" is an open space lying between a side lot line and a side wall of a building and running from the the front yard to the rear yard.

L. Required Yard or Court. A "required yard" or a "required court" is any yard or court required as a minimum under the provisions of this ordinance. A "required yard" shall begin at a lot line and shall extend therefrom toward the interior of the lot; and where a lot line is irregular, its mean alignment shall be taken in determining measurements under this Ordinance.

M. Court. A "court" is an open space, other than a yard, upon a lot containing a building. An "outer court" is one which extends for its full width to a yard giving access to a street. An "inner court" is any other than an "outer court." The width of an "outer court" is its horizontal dimensions substantially parallel with its principal open end. The width of an "inner court" is its lesser horizontal dimensions. The "height" of a court is to be measured from the lowest floor level it is required to serve up to the top of the highest wall which bounds it.

N. Family. A "family" is any number of persons living privately together as a single family or housekeeping unit and using housekeeping and cooking facilities and certain rooms in common.

O. Camp. The term "camp" as used in this ordinance shall mean one or more temporary or permanent tents, buildings or structures together with the tract of land appertaining thereto, established or maintained as living quarters for temporary occupancy by ten or more persons including children either free of charge or by payment of a fee.

This provision shall not apply to persons licensed under section 482 of the penal law and section 304 of the state charities law or to hotels which are complying with the provisions of article XII of the General Business Law and section 354 and 355 of article XX of the Public Health Law.

P. Non-conforming Use. A "non-conforming use" is any use of a structure which does not conform with the provisions of this Ordinance for the district in which it is located.

Q. Accessory Building. An "accessory building" is a building such as a stable, garage, playhouse, barn or greenhouse, which is subordinate or accessory to a main building erected on the same lot which in any "residence district" is not available to the public.

R. Garage. A "garage" is a building *used* for the housing of one or more motor vehicles.

S. Private Garage. A "private garage" is a garage maintained primarily for the convenience of the resident occupant of the premises and in which no business is carried on and no service is rendered to the public.

T. Public Garage. A "public garage" is any garage other than a private one.

U. Motor Vehicle. A "motor vehicle" is any self-propelling vehicle which is licensed to travel over the streets and highways. In calculating garage accommodations under the Ordinance two two-wheeled motorcycles shall be considered as the equivalent of one motor vehicle.

V. Filling Station. A "filling station" is any establishment supplying and selling gasoline or other fuel direct to motor vehicles, from any apparatus located outside a building and on private property.

W. Open Porch. An "open porch" is a piazza or porch with or without a roof which projects beyond a main wall

of a building. If an open porch extends into a required front yard the columns supporting the roof shall present the minimum of obstruction to the circulation of air and the view side-ways through the porch. Any sash placed between the columns during the winter season shall be glazed with glass.

X. Electric Motive Power. "Electric motive power" is power which is developed from electricity by an electric motor.

SECTION 4. GENERAL PROVISIONS.

A. Future Uses, Construction and Changes. No building or part thereof may be constructed, moved, extended, altered, or used except in conformity with the provisions of this Ordinance.

B. Non-conforming Uses and Conditions. If, at the time of enactment of this Ordinance, any building or premises is being *used* or if any building is being constructed, moved, extended or altered, and such work is completed within nine months after the enactment of this Ordinance, in a manner or for a purpose which does not conform with the provisions of this Ordinance, and which is not prohibited by any other existing Ordinance, such use, manner or purpose may be continued even under a change of title or possession. A non-conforming use if discontinued for a period of one year or longer, or if changed to a conforming use, shall never again be continued as, or changed back to, a non-conforming use.

C. Extending Non-conforming Uses. Any such non-conforming use may hereafter be extended throughout any part of a building or premises which was manifestly arranged or designed for such use at the time of enactment of this Ordinance, provided, however, that a Certificate of Occupancy be first obtained for such extension of use.

D. Restoring Unsafe Buildings. Nothing in this Ordinance shall prevent the strengthening or restoring to a safe or lawful condition of any part of any building declared unsafe or unlawful by the Building Inspector, hereafter called the Inspector, or other duly authorized State, County or Town Official.

E. Lots Prohibited for Residence Purposes. In the "Residence A" and "Residence B" Districts no lot shall hereafter contain any building *used* for residence purposes unless such lot abuts for at least 50 feet on at least one street, or unless it has an unobstructed easement of access or right-of-way at least 15 feet wide to a street. In the "Residence A" and "Residence B" Districts no lot shall house more than one family unless it shall contain at least 5,000 square feet; except that these restrictions may be modified by the Board of Appeals in individual cases with respect to lots existing at the time of enactment of this Ordinance.

F. Projections and Encroachments into Required Open Spaces. Except as hereinafter specified in this Section, yards and courts required under this Ordinance shall be entirely free of buildings or parts thereof.

G. Cornices and Eaves. Cornices and eaves may project not to exceed 18 inches over any required yard or court.

H. Ornamental Features, Balconies, Etc. Sills, belt courses and similar ornamental or structural features may project 6 inches into any required yard or court. An open fire balcony or fire escape, or a fire tower may project into a required yard not more than 4 feet.

I. Bay Windows, Porches, Etc. Ground story bay windows, oriels or balconies, having a combined total width not exceeding one-half of the length of the wall to which they are attached, may project not more than 3 feet into any required rear yard or into any required side yard which is more than 6 feet wide. An open porch or portecochere not more than one story high may project

into any required side yard, provided it does not come nearer the side lot line than a distance equivalent to one-half of the width of the side yard required as a minimum for that lot.

No porch, oriel, bay window, balcony, portecochere or stairway constructed under the provisions of the paragraph just preceding shall have a width or a greater dimension in excess of twice the distance of its projection.

An open porch, stairway or entranceway, or a bay-window not higher than the first story of a building may project not to exceed 10 feet into a front yard required as a minimum on that lot.

J. Chimneys, Shafts, Etc. A chimney, smoke-stack, flue or elevator shaft may project into any yard or court required as a minimum, provided the horizontal section of the projection does not exceed 8 square feet in any "Residence" district, or 9 square feet in any "Business" district.

K. Walls, Fences, Steps, Etc. The requirements of this Ordinance respecting yards and courts and projections shall not apply to any necessary retaining wall, nor to any fence or wall which is less than 10 feet high.

L. Building Extensions. A ground story extension of a building may project into a required rear yard not more than 10 feet, provided it does not extend within 15 feet of a rear lot line in a "Residence A" or "Residence B" District, 3 feet in a "Residence C" District or 10 feet in a "Business or Industrial" District, and that the width of such projecting portion shall not be greater than twice the amount of the projection.

M. Location and Coverage of Accessory Buildings.

1. No accessory building permitted by this Ordinance shall be placed in any required side or front yard except as specified hereinafter in this Section. The aggregate ground area covered by accessory build-

ings in any rear yards, including the ground area covered by any projections other than cornices and eaves, hereinbefore permitted shall not exceed 35 per cent of the required rear yard area in any: "Residence" district. In any "Business" or Industrial" district, or any lot where a ground level rear yard is required, the aggregate area covered by accessory buildings and the last above mentioned projections shall not exceed 50 per cent of the required yard area.

2. In the case of exceptionally wide lots, where side yards are provided of greater width than required by this Ordinance, accessory buildings may be erected in such side yards, provided that the side yard required as a minimum by this Ordinance for the particular district involved be left open and that no part of any such accessory building shall be within 10 feet of the main building in a "Residence" district, nor shall it be located nearer to the front lot line than the front yard depth required in that district for the main building plus 25 feet.

N. Limitations on Accessory Building.

1. No accessory building within 50 feet of any lot in any "Residence" district shall be more than two stories high and none which is erected within 6 feet of any party lot line shall be more than one story high; nor shall any accessory building within any "Business" or "Industrial" district which is within 10 feet of any party lot line within or bounding a "Residence" district be more than two stories high; and no accessory building shall be within 3 feet of any party lot line in any "Residence" district; except that this shall not prevent the erection in any district of a permitted common private garage one story high, of fireproof construction and housing not more than 6 motor vehicles, across their party lot line by owners of two adjoining properties;

2. No accessory building erected in a rear yard on any lot in any district shall be *used* for residence purposes except by servants, or domestic employe of the tenant or owner of the premises;

3. No accessory building erected in a rear yard within any "Residence" district shall be closer than 10 feet to a main building unless it be constructed as an integral part thereof.

O. Corner Lot Modification. Any accessory building on a corner lot in any "Residence" district shall be distant not less than 25 feet from the side street line; except that where a lot is less than 50 feet in width, one foot may be deducted from the above required setback for each foot the lot is less than 50 feet; and when the rear of any corner lot abuts any lot facing on a street which is a side street with reference to said corner lot, any accessory building on the corner lot shall not be built nearer the rear line of the corner lot than a distance equivalent to 10 per cent of the depth of the corner lot and in no case shall this distance be less than 10 feet, but not necessarily more than 25 feet.

P. Reducing Lot Area. No space which, for the requirements of one building has been counted or calculatel as a part of a side yard, rear yard, front yard, court or other open space, required by this Ordinance may, by reason of change in ownership or otherwise, be counted or calculated to satisfy or comply with a yard, court or open space requirement of or for any other building.

Q. Through Lot Requirements. A through lot shall be considered as having two street frontages each of which frontages shall be subject to the front yard requirements prescribed in Section 13 of this Ordinance. The owner of a through lot shall specify, when applying for a Certificate of Occupancy, which street lot line shall be deemed the front line.

R. Restrictions on Junk Yards. *No structures or premises* shall be *used* for the storage or sale of junk

in any "Residence" or "Business" District and when located in an "Industrial" District such a use shall not be located nearer than 100 feet to the boundary line of a "Business" or "Residence" District.

SECTION 5. "RESIDENCE A" DISTRICT USES.

Within any "Residence A" District no building or *premises* shall be *used* in whole or in part for any industrial, manufacturing, business, commercial, or other gainful purposes, except as hereinafter specified, nor for any other than the following specified purposes:

1. Single detached house *used* as a residence by not more than one family;
2. Residence containing the professional office or studio of a physician, surgeon, dentist, lawyer, dressmaker, artist or musician when situated in the same building used by such physician, surgeon, dentist, lawyer, dressmaker, artist or musician as his private dwelling;
3. Church or other place of worship, including parish house and Sunday School Building;
4. School, hospital, sanitarium, library, museum or other buildings used by the Federal, State, County or Town Governments for public purposes;
5. Hospital or sanitarium not treating contagious diseases except incidentally and not for the care of epileptic, drug or alcoholic patients; religious, charitable or philanthropic institutes not of a correctional nature and not for the care of the insane or feeble minded; all provided that no building so used shall be within 100 feet of any street line or lot line;
6. Club house occupied by a membership organization catering exclusively to its members and their guests and not conducted for gain;

7. Farming, agriculture, floriculture, nurseries, green houses or truck gardening, including the breeding and care of small laboratory animals, fur bearing animals and ornamental birds, and excluding the breeding and care of hogs, ducks or dogs for commercial purposes.

8. Buildings *used* for the display or sale of products grown and harvested by labor paid for by the owners of the buildings on the premises where the products are displayed or sold.

9. Public utility buildings, only when their location within a "Residence A" District is necessary for the furnishing of service to subscribers, and provided that no public business offices, warehouses, construction, or repair shops, nor garage facilities are included:

10. Small professional or announcement sign not over 2 square feet in area if fixed to the main wall of a residence building; name or announcement sign fixed to the main wall of a church, parish house, school, club, or public or semi-public building and which is not over 6 square feet in area, provided that such sign shall refer only to the premises which it occupies and is erected behind the prevailing front line of that block; and further provided that there shall not be more than two such signs on a lot;

11. Real estate signs not more than 15 square feet in area and located behind the set-back building line, and advertising the sale, rental or lease of only the premises on which they are maintained; and further providing that there shall not be more than three such signs on a lot;

12. Accessory building customarily incident to any use permitted in this section.

13. Boarding and/or rooming houses with accommodations not to exceed five boarders or roomers.

SECTION 6. "RESIDENCE B" DISTRICT USES.

Within any "Residence B" District no building or *premises* shall be *used* in whole or in part for any industrial, manufacturing, business, commercial or other gainful purposes, nor for any other than the following specified purposes:

1. Any use specified in Section 5 and permitted within a "Residence A" District;
2. Single, detached house used as a residence by not more than two families;
3. Semi-detached houses divided by a party wall, each side of which is used as a residence by not more than one family;
4. Accessory building customarily incident to any use permitted in this section.

SECTION 7. "RESIDENCE C" DISTRICT USES.

Within any "Residence C" District no building or premises shall be *used* in whole or in part for any industrial manufacturing, business, commercial or other gainful purpose, nor for any other than the following specified purposes:

1. Any use specified in Section 5 and 6 are permitted in "Residence A" and "Residence B" Districts;
2. Apartment or row houses for any number of families provided that the total ground area covered by the building does not exceed 35 per cent of the area of the lot upon which it stands.

SECTION 8. "BUSINESS A" DISTRICT USES.

Within any "Business A" District no building or premises shall be *used* for other than one or more of the following specified purposes:

1. Any purposes permitted within any "Residence" District as specified in Sections 5, 6, and 7 and without limitations as to public or gainful use;

2. Any lawful residential, social, institutional, educational, recreational, amusement, athletic, charitable, or religious purpose;

3. Commercial uses customarily incident to any use permitted in this Section, provided there is no display or advertising other than a small announcement sign not exceeding 6 square feet in area;

4. Boarding or rooming houses and hotels provided there is no display or advertising other than a small announcement sign not exceeding 6 feet square in area.

SECTION 9. "BUSINESS B" DISTRICT USES.

Within any "Business B" District no building or premises shall be used for other than one or more of the following purposes:

1. Any purposes permitted within any "Residence" District and within a "Business A" District as specified in Sections 5, 6, 7 and 8 and without limitation as to public or gainful use.

2. Commercial or business purposes excepting the slaughtering of animals or fowls;

3. Manufacturing, processing, producing, or fabrication operations which do not produce injurious or offensive noises, fumes, smoke, odor, or vibrations.

SECTION 10. "INDUSTRIAL" DISTRICT USES.

Within any "Industrial" District no building or premises shall be *used* in whole or in part for any of the following specified purposes:

1. The slaughtering of animals, or the manufacture, processing or conversion of any commodity of which the principal ingredient is refuse animal matter;

2. The manufacture of acids, or other corrosive chemicals; abrasives, ammonia, asphalt, caustic sodia, cellulose, celluloid, cement, chlorine, cleansing, bleaching or washing compounds; coal tar distillates, coke, cotton seed products; creosote or creosoted products; fertilizer, fireworks, acetylene gas, glue, gunpowder or other explosives; glucose, insecticides, lime, linoleum; matches; oilcloth, oils or petroleum products; paint, paper pulp; potash, shoe black, soap, starch; stove polish, sulphur products; varnish, vinegar, wall plaster, wood distillates, yeast;

3. The incineration of animals or animal matter and the dumping of garbage and refuse by other than the Town of Clarkstown;

4. Any trade industry, or purpose that is not noxious or offensive by reason of the emission of odor, dust, smoke, gas, or noise as to be dangerous to public health, safety, or general welfare.

SECTION 11. GARAGES, STABLES, FILLING STATIONS.

A. A Stable Equivalent to a Garage. For the purpose of this Ordinance a stable for horses or mules shall be deemed to be equivalent to a garage, and one horse, or one mule and one vehicle, or two motorcycles, shall be deemed to be equivalent to one motor vehicle.

B. Permitted Garages.

1. Public garages are excluded in any "Residence" or "Business A" Districts, but a private garage or a group of private garages is permitted in any district;

2. Within any "Residence" District on any lot having an area of less than one acre, private garage space may

be provided for not more than five motor vehicles, and one additional motor may be accommodated for each one-fifth acre that the area of the lot exceeds one acre, except that nothing in this paragraph shall prevent the construction, on the same or an adjacent lot, of a sufficient number of private garages for the accommodation of 65 per cent of the prospective tenants in an apartment or row house in a "Residence C" District, provided that the total ground area covered by the main building, its accessories and the hereinbefore mentioned garages does not exceed 35 per cent of the total area of the lot or lots in question;

3. Within any "Residence" District not more than one-half of the garage space provided on any lot shall *be used* for housing of commercial vehicles, excepting vehicles used primarily for agricultural purposes or for the transportation of agricultural products; nor shall more than one commercial motor vehicle be housed on any lot having an area of less than 6,000 square feet; nor shall any private garage be erected on any lot except as an accessory to a main building on that lot;

4. Within any "Residence" District no private garage built into a basement or terrace shall project in any part, except the doors when open, more than 4 feet into a required yard.

C. Renting Garage space. Within any "Residence" District not more than one-half of the garage space provided on any lot shall be rented to, or *used* by, any other than the owner or lessee of the premises or by a person residing in the main building on that lot, except that on any lot space for at least one noncommercial motor vehicle may be rented out, or sub-let.

D. Restriction on Public Garages and Filling Stations;

1. No part of any public garages shall be *used* for residence or sleeping purposes;

2. No part of any entrance to or exit from any public garage accommodating more than five motor vehicles or any filling station shall be connected with a public street at a point within two hundred feet of any building located on either side of the same street upon which said public garage or filling station is located and used as a theatre, auditorium or other place of public assembly seating over 100 persons, or used as a church, hospital, college, school, or institution for dependents or children.

3. No part of any building used as a public garage or filling station and no filling pump, lift or other service appliance shall be erected within 20 feet of any boundary line or any "Residence" District;

4. No gasoline or oil pump, no oiling or greasing mechanisms and no other service appliance installed in connection with any filling station or public garage shall be within 10 feet of any street line, unless contained within a building and 10 feet from any street door.

SECTION 12. HEIGHT AND VOLUME OF BUILDINGS.

A. Except as specified in this Section, no building shall be erected in excess of the following heights;

Within "Residence A" Districts, 60 feet.
Within "Residence B" Districts, 50 feet.
Within "Residence C" Districts, 85 feet.
Within "Business A" Districts, 60 feet.
Within "Business B" Districts, 45 feet.
Within "Industrial" Districts, 65 feet.

B. The hereinbefore specified height limits shall not apply to transmission or aerial towers, masts, flagpoles, or monuments; nor to domes, cupolas, church spires, belfries and similar area of such parts shall not exceed 30 per cent of the ground area covered by the main building; nor shall the specified height limits apply to parapet walls not over 4 feet high.

C. All measurements of building heights shall be made and determined in the following manner:

If a curb level has been established on the street on which the building faces and the mean level of the lot is lower or not more than 5 feet higher than the mean front curb level the measurement shall be made from that curb level. If the mean level of the lot is more than 5 feet higher than that curb level, or if there be no such established curb level, or if the building sets back more than 50 feet from a street, the measurements shall be made from the mean level of the lot immediately adjacent to the building foundations. All such measurements shall be made vertically to the mean level of the main portions of the roof.

SECTION 13. FRONT YARDS.

A. Requirements in "Residence" and "Business" Districts.

1. Within any "Residence" or "Business A" District, a front yard is required on every lot which, except as specified in this Section, shall be a mean depth not less than the following:

In "Residence A" Districts, 40 feet.
In "Residence B" Districts, 25 feet.
In "Residence C" Districts, 30 feet.
In "Business A" Districts, 30 feet.

except that in any "Residence A" District on any lot having, at the time of enactment of this Ordinance, a

mean debt, of less than 100 feet, 5 feet may be deducted;

2. If on one side of a street within a given block there is a pronounced uniformity of alignment of the fronts of existing buildings and of depths of front yards greater than the depths herein specified, a front yard shall be required in connection with any new building which shall conform as nearly as practicable with those provided on the adjacent lots; except that no such building shall be required to set back from the street a distance greater than 50 feet;

3. If on one side of a street within a given block there is pronounced uniformity of alignment of the fronts of existing buildings less than herein specified, the Board of Appeals may, upon application of any individual case, permit a reduction of the front yard depths hereinbefore specified in this section for the purpose of preserving said uniformity of alignment;

4. On any lot within a "Business B" District which is on the same side of the street and within 50 feet of the boundary line of any "Residence" or "Business A" District, a front yard or equivalent open space is required of a depth not less than one-half of the minimum front yard depth prescribed herein for that class of District which adjoins such "Business B" District.

B. Maintaining Established Building Lines. Nothing in this Section shall justify or cause violation of any existing Ordinance regulation, agreement or contract which prescribes in any district a building line along any street the adherence to which would create a front yard or equivalent open space of a depth greater than is specified in this Section for that district. If, on any street, a new street line has been established by ordinance in anticipation of future street widening, such new street line shall be taken as the lot line in determining yard depths.

SECTION 14. REAR YARDS.

A. Requirements in "Residence" and "Business A" Districts. Within any "Residence" or "Business A" Districts a rear yard is required on every lot, which shall not be less in depth than either of the following minima, whichever is greater:

1. No part of any main building shall be nearer to a rear lot line than the following percentage of its height above the curb or ground level, as such is determined in Section 12, subsection C:

   "Residence A" Districts, 90 per cent.
   "Residence B" Districts, 75 per cent.
   "Residence C" Districts, 50 per cent.
   "Business A" Districts, 50 per cent.

2. No rear yard shall be less in depth than as specified in the following table in any case:

   "Residence A" Districts, 30 feet.
   "Residence B" Districts, 30 feet.
   "Residence C" Districts, 15 feet.
   "Residence A" Districts, 15 feet.

B. Requirements in "Business" and "Industrial" Districts.

1. Within any "Business" or "Industrial" District where the building is used in any part for residence purposes, the minimum rear yard depth shall be 15 feet, and for each foot that the height of said building exceeds 25 feet there shall be added 4 inches to the required depth.

2. Within any "Business" or "Industrial" District where the building is not used in any part for residence purposes no rear yard is required at the ground story level, but if provided, shall not be less than 10 feet in depth. For parts of such building above the first story a rear yard is required which shall be of a depth of 6 inches for every foot by which the building exceed

15 feet in height, and not less than 10 feet deep in any case.

SECTION 15. SIDE YARDS.

A. Requirements in "Residence" and "Business A" Districts. Within any "Residence" or "Business A" District a side yard is required along each side of every building used as a residence neither of which side yards shall be less in width than either of the following minima, whichever is greater:

1. No part of any main building shall be nearer to a side lot line than the following percentage of its height above the curb or ground level, as such is determined in Section 12, subsection C:

   "Residence A" Districts, 75 per cent.
   "Residence B" Districts, 50 per cent.
   "Residence C" Districts, 25 per cent.
   "Business A" Districts, 25 per cent.

2. The following are minimum widths of side yards permitted but for lots narrower at the time of passage of this Ordinance than those specified, the following tabulated allowances may be deducted, provided that the side yard may be not less than the following stated absolute minimum in any case:

District	Minimum Side Yard	For Lots Narrower than	Deduct per Foot of Diminution	Minimum in Any Case
"Residence A"	25'	100'	3"	6'
"Residence B"	15'	50'	4"	5'
"Residence C"	8'	50'	3"	6'
"Business A"	8'	50'	3"	6'

3. Within any "Residence B," "Residence C" or "Business A" District, where a residence building is of the two-family, semi-detached or row-house type, then the side yard requirements specified in subsection A (2) shall be increased by 50 per cent.

B. Requirements in "Business B" and "Industrial" Districts.

1. Within any "Business B" or "Industrial" District along any side lot which serves as a boundary line between that lot and any "Residence" District, a side yard is required of a width as specified in the immediately preceding subsection A, paragraphs (1) and (2), for said "Residence" Districts;

2. Within any "Business B" or "Industrial" District on any lot other than those specified above in paragraph (1) of this section, no side yard is required but if a side yard be provided it shall conform to the requirements for "Residence C" Districts, as stated above in subsection A, paragraphs (1) and (2) of this section.

SECTION 16. COURTS.

A. When Required. Within any District a court is required wherever any room in which people live, sleep, work or congregate cannot be adequately lighted or ventilated directly from a street or a yard on the same lot to afford natural light and ventilation of such room, but no court need extend below the floor level of the room or rooms it is required to serve.

B. Required Size. Within any District the minimum width of an outer court shall be in the ratio of 3 inches to each foot of its height, and not less than 6 feet; and of an inner court, in the ratio of 4 inches to each foot of its height; not less than 8 feet. No outer court shall be longer

than twice its width; and no inner court shall be shorter than twice its width.

C. Accessibility. Every court that is not otherwise accessible at its lowest level shall be made accessible by a door or other means to enable it to be properly cleaned.

SECTION 17. INTERPRETATION AND PURPOSE.

In their interpretation and application the provisions of this Ordinance shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals and general welfare; for lessening congestion in the streets; and securing safety from fire, panic and other dangers; for the provision of adequate light and air; for preventing over-crowding of lands or buildings; for the avoidance of undue concentration of population and for facilitating adequate provisions for transportation, water, sewerage, schools, parks and other public improvements. It is not intended by this Ordinance to repeal, abrogate, annul or in any way to impair or interfere with any existing law or ordinance or any rules, regulations or building permits previously adopted or issued or which shall be adopted or issued pursuant to law, relating to the use or construction of buildings or the provision of yards, courts, or other open spaces; provided, however, that the provisions and requirements of this Ordinance shall be held paramount to any corresponding or similar provisions of any existing law, ordinance, rule or regulation which provides a lesser degree of protection to the public health, safety, morals and general welfare than is intended by this Ordinance.

SECTION 18. ENFORCEMENT.

A. Authority and Duties of the Building Inspector. The Ordinance shall be enforced by the Inspector who shall in no case, except under a written order of the Board of Appeals approve an application for, or issue any Certifi-

cate of Occupancy with respect to any building or premises where the construction, alteration or use thereof would be in violation of any provision of this Ordinance.

B. Certificate of Occupancy. No building hereinafter erected or altered shall be occupied or used in whole or in part for any purpose whatsoever until a Certificate of Occupancy shall have been issued by the Inspector, stating that the premises or building complies with all the provisions of this Ordinance.

No change or extension of use and alteration shall be made in a non-conforming use or premises without a Certificate of Occupancy having first been issued by the Inspector that such change, extension or alteration is in conformity with the provisions of this Ordinance.

Certificate of Occupancy shall be applied for at the same time that the building permit is applied for and shall be issued within ten days after the erection or alteration of the building shall have been completed. A record of all certificates shall be kept on file in the office of the Inspector and copies shall be furnished upon request to any person having a proprietary or tenancy interest in the building affected. A fee of two dollars shall be charged for each original certificate and one dollar for each copy thereof.

No permit for excavation for, or the erection of any building shall be issued before application has been made and approved for a certificate of occupancy. No building or premises may be occupied until such certificate shall have been issued.

SECTION 19. BOARD OF APPEALS.

A. Creation of Board of Appeals.

As provided in the Town Law of the State of New York there is hereby established a Board of Appeals to be composed of five members, who shall be residents of

the Town of Clarkstown, to be appointed by the Supervisor, with the concurrence of the Board. Vacancies occurring in such Board by expiration of term or otherwise shall be filled in the same manner. The Board of Appeals shall be organized and shall function in the manner prescribed by statute and shall have all the general powers granted by statute and the following specific powers:

1. To make the determination, prescribe the regulations and grant the variances hereinbefore specified.

2. To authorize the Inspector, in writing, to issue Certificates of Occupancy for limited periods of time and under such conditions as that Board may prescribe for the use of premises, in the sparsely settled sections within any "Residence A" District, which are not permitted by this Ordinance in such districts but which are considered by said Board to be promotive of the best interests of the community;

3. To authorize the Inspector, in writing and after public hearing, to issue Certificates of Occupancy for the use of premises, in the sparsely built up sections within any "Residence A" District, under such conditions and regulations as that Board may prescribe for penal or correctional institutions, or hospitals for contagious diseases, incurables, the insane or feeble minded, epileptics or drug or liquor addicts; provided, however, that no building so used shall be erected within 250 feet of any existing street line or lot line.

4. To authorize the Inspector, in writing and after public hearing, to issue Certificates of Occupancy for the use of premises for the extension of excavation and sale of shale, sand, clay, gravel or natural mineral deposits or the quarrying of any kind of rock formation to the limits of property owned, at the time of passage of this ordinance, by companies then operating this type of activity in the Town of Clarkstown provided that:

a. No quarry wall shall be nearer than 50 feet to any lot line.

b. No rock crusher, cement plant or other crushing, grinding, polishing or cutting machinery or other physical or chemical process for treating the product of such quarry shall be permitted.

c. The product of such quarry shall be removed in the form in which it is quarried.

5. To authorize the Inspector, in writing and after public hearing, to issue temporary Certificates of Occupancy for the use of premises for a camp in any "Residence" District for a period not exceeding 5 years' duration, provided:

a. There are filed with such application the consents in writing, duly acknowledged, of the owners of 50 per cent, measured lineally around the boundary of the property contiguous to the property for which such permit is sought.

b. At least ten days notice of such pending application is given by mail by the Secretary of such Board of Appeals to all persons recorded on the last preceding assessment roll as owning property within 2,500 feet of the property for which such permit is sought, and such services of notice by mail to such property owners shall be deemed to have been effected when duly stamped envelopes containing such notices and addressed to their last known addresses shall have been duly deposited in the mails.

c. No portion of the property for which such permit is sought is within 1,000 feet of a water course which is a part of any water supply system.

d. Each structure in such camp intended for residence, cooking or recreation purposes is equipped with toilets which drain into septic tanks of a design ap-

proved by such Board or connected with a sanitary sewer in the public highway.

e. The number of persons to be accommodated in such camp shall not exceed 1 for each 10,000 square feet of area within such grounds.

f. No camp structure shall be located within 300 feet of any lot line.

B. Procedure of Board of Appeals.

1. The procedure of the Board of Appeals shall be in accordance with the provisions of the statute creating such Board and it shall adopt from time to time such rules and regulations as it may deem necessary in exercising its functions which are not inconsistent with its statutory authority and all its resolutions and orders shall be in accordance therewith;

2. The Board of Appeals shall, within thirty days, hear and determine appeals resulting from any refusal of a Certificate of Occupancy by the Inspector where such refusal is based on non-compliance with the provisions of this Ordinance or review protested orders or decisions of such Inspector where such order or decision is based on the provisions of this Ordinance.

SECTION 20. VIOLATIONS AND PENALTIES.

For any and every violation of the provisions of this Ordinance or of any order issued under its authority, the owner, contractor, or other person interested as lessee, tenant or otherwise in any building or premises where such violation has been committed or shall exist, and who fails to abate such violation within ten days after written notice has been served upon him either by mail or by personal service shall for each and every violation be subject to a fine of not more than one hundred dollars or five days' imprisonment or both, at the discretion of the court or judi-

cial officer before whom a conviction may be had. Each and every day that such violation continues after such notice, shall be considered as a separate and specific violation of this ordinance and not as a continuing offense.

SECTION 21. AMENDMENTS.

This Ordinance may be amended, revised or repealed by the Town Board in the manner provided by law.

SECTION 22. VALIDITY.

Should any section, part or provision of this Ordinance be held unconstitutional or invalid such decision shall not affect the validity of this Ordinance as a whole or any part thereof other than the part so held unconstitutional or invalid.

SECTION 23. SHORT TITLE.

This Ordinance shall be in force and effect immediately Ordinance.

SECTION 24. WHEN EFFECTIVE.

This Ordinance shall be in force and effect immeditely upon adoption and publication as provided by law.

Dated: April 4th, 1939.

TOWN BOARD OF THE
TOWN OF CLARKSTOWN

By ROSWELL P. BLAUVELT,
Supervisor.

NORMAN R. BAKER,
CHARLES EBERLING,
JOHN T. GILCHREST,
B. OTTO JACOBSEN,
Councilmen.

KATE BUCHENAU,
Town Clerk.

STATE OF NEW YORK,
COUNTY OF ROCKLAND, } ss.:

I, KATE BUCHENAU, Town Clerk of the Town of Clarkstown, Rockland County, New York, Do HEREBY CERTIFY that the foregoing is a true copy of the Building Zone Ordinance of the Town of Clarkstown and of the whole thereof duly adopted at a meeting of the Town Board of said Town held on the 4th day of April, 1939, and entered on the same day in the minutes of the Town of Clarkstown.

KATE BUCHENAU,
Town Clerk.

LEXOW & JENKINS.
Attorney for the Town of Clarkstown,
Office & P. O. Address:
70 Lafayette Avenue,
Suffern, New York.

Building Zone Ordinance amended to June 1, 1952.

AUGUST H. HANSEN,
Town Clerk,
Town of Clarkstown.

"Building Zone Map, Town of Clarkstown" referred to in Section 2 of the Building Zone Ordinance of the Town of Clarkstown, Rockland County, New York, approved and filed in the office of the Town Clerk of the Town of Clarkstown on April 4th, 1939.

Dated: April 4, 1939.

ROSWELL P. BLAUVELT,
Supervisor.
J. T. GILCHREST,
B. OTTO JACOBSEN,
CHARLES EBERLING,
NORMAN R. BAKER,
Councilmen.

KATE BUCHENAU,
Town Clerk.

Filed April 4, 1939.

KATE BUCHENAU,
Town Clerk.

Amended Map filed October 18, 1941.
Amended Map filed May 15, 1946.
Amended Map filed August 30, 1947.
Amended Map filed October 17, 1949.
Amended Map filed April 10, 1951.

Resolution of the Town Board of the Town of Clarkstown, New York

WHEREAS, a petition verified June 7th, 1939, was filed in the Town Clerk's office on June 19th, 1939, by the New York Trap Rock Corporation, a corporation organized under the laws of the State of New York and having its principal place of business located at Rockland Lake, in the Town of Clarkstown, Rockland County, New York; and

WHEREAS, a petition verified June 12th, 1939, was filed in the Town Clerk's office on June 19th, 1939, by the West Nyack Trap Rock Company, Inc., a corporation organized under the laws of the State of New York, and having its principal place of business located at West Nyack, in the Town of Clarkstown, Rockland County, New York; and

WHEREAS, both of said petitioners have requested and petitioned the Town Board of the Town of Clarkstown to amended the Building Zone Ordinance of said Town in certain particulars, more particularly set forth in said petitions, which changes or amendments, generally speaking, would have the effect of transferring the real property of said petitioners described in said petitions from the "Residence A District," as defined in said Building Zone

Ordinance, to a new district to be created and to be described in said Ordinance as "Industrial B Districts," and permitting the petitioners, in said "Industrial B District," among other things, to carry on the business of quarrying and preparing stone and manufacturing stone products of any and all kinds, etc.; and

WHEREAS, by order of the said Town Board of the Town of Clarkstown, a public hearing on each of said petitions was ordered to be held at the Town Clerk's office in New City, N. Y., at 7:00 o'clock P. M., Eastern Standard Time, on the 29th day of March, 1940; and

WHEREAS, notice of said hearing on each of said petitions was duly given by publishing the same in the Journal-News on March 13th, 1940; and

WHEREAS, the said Town Board met at the time and place mentioned in said notices and held a public hearing on each of said petitions, at which all persons who appeared at said hearings were given an opportunity to be heard, and said Town Board having given due consideration to the prayer of each of said petitions and the objections made to the granting thereof, and having inspected all of the property described in each of said petitions, as well as the surrounding property lying adjacent thereto; and the matter having been duly adjourned until this day;

NOW, THEREFORE, BE IT RESOLVED, that the real property hereinafter described, owned by the New York Trap Rock Corporation and included in its petition filed herein on June 19th, 1939, be and the same hereby is transferred from the Residence A District to the Industrial District and that the Building Zone Map of the Town of Clarkstown, Rockland County, New York, be amended accordingly.

The real property hereinabove referred to is described as follows:

ALL that tract of land, situate in the Town of Clarkstown, Rockland County, New York, described as follows:

BEGINNING at a point on the Short Clove Road, distant 100 feet easterly from the intersection of the Short Clove Road and the Scratch-Up Road; thence southerly along a line parallel to the Scratch-Up Road and 100 feet distant therefrom to a point 100 feet north of the Long Clove Road; thence southeasterly along a line parallel to the Long Clove Road and 100 feet distant therefrom to the intersection of this line with the Town line; thence northerly along the Town line to the center of the Short Clove Road; thence southerly along the center of the Short Clove Road to the place of beginning.

FURTHER RESOLVED, that the real property above described, after this amendment to the Building Zone Ordinance of the Town of Clarkstown, Rockland County, New York, shall take effect, shall be free from the restrictions theretofore imposed upon it by the provisions of said Ordinance governing Residence A Districts and shall thereafter be subject only to the provisions of said Ordinance governing Industrial District uses.

FURTHER RESOLVED, that the balance of the real property of the said New York Trap Rock Corporation described in said petition shall remain in the Residence A District, as described on said Building Zone Map, and shall be subject to the provisions of said Building Zone Ordinance governing Residence A District uses.

APPENDIX B-2

Town Law of N. Y., Article 16

SECTION "261. GRANT OF POWER.

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city. Such regulations may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained."

SECTION "263. PURPOSES IN VIEW.

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buldings and encouraging the most appropriate use of land throughout such municipality."

[Vol. 61 McKinney Consolidated Laws of New York Annotated]